

>> weapon. In Shelton, the officer testified that he frisked for “routine safety reasons” and that every time he detained an individual he performed a frisk. During the frisk, the officer found an item that could not have been mistaken for a weapon, and in fact, the officer admitted he “had no idea what it was.” It was, in fact, a soft package of cocaine. Although other facts in the case suggested that the officer may have actually had reasonable suspicion, the reason actually given for the frisk was simply officer safety. Further, the item removed could not have been perceived as a weapon at all. The Court found that an insufficient reason and allowed the evidence (in this case drugs) to be suppressed.

TRAFFICKING IN OR NEAR A SCHOOL

One statute in the KRS that has been extensively used in the war against drugs is KRS 218A.1411, trafficking in or near a school. There have been two very important developments regarding this statute in the past year, one being an amendment by the General Assembly, the other a court case.

In the 2011 General Assembly regular session, two bills were passed which among other things amended KRS 218A.1411 in exactly the same manner. Previously, the statute punished as a class D felony trafficking in any controlled substance or controlled substance analogue in any building used primarily for classroom instruction or on any premises located

within 1,000 yards of such a building. As part of the General Assembly’s efforts to reduce the prison population, in HB 463, the radius was reduced to 1,000 feet. The same change was enacted in HB 121, Section 8. This has the obvious effect of greatly reducing the applicability of the law. Under the old language, the locations of the schools in a community caused nearly the entire community to be covered by the law. With this change, prosecutions and convictions for violations of KRS 218A.1411 will likely decline significantly. It is still punished as a class D felony.

In 2010, the Kentucky Supreme Court handed down its decision in the case of Saxton v. Com., 315 S.W.3d 293 (Ky. 2010). The issue in the case was whether Saxton could be convicted of a violation of KRS 218A.1411 when he was unaware of the location of a school building and his proximity to it when he was trafficking in controlled substances. The court upheld Saxton’s conviction, holding that there was nothing in the text of the statute that required that the actor had to be aware of the proximity to the school building. It was enough that he was trafficking within the 1,000-yard radius. There is no reason to believe that the holding in Saxton would not apply within the reduced coverage of a 1000-foot radius as KRS 218A.1411 has been amended.

KRS 218A.1411 is still a valuable tool to be used when applicable to combat drug trafficking activity in and around the

schools of the commonwealth. Officers should make use of it whenever it will apply.

KIDNAPPING EXEMPTION

During the investigation of a sexual or other assault, the facts often suggest that the victim was also held down for longer than would be necessary to commit the actual underlying crime. In such cases, the investigating officer might consider also placing charges of unlawful imprisonment or even kidnapping. Several cases in recent years have clearly indicated that the charge might apply if the facts are appropriate. In Griffith v. Com., 2009 WL 277333 (Ky. App. 2009), for example, Griffith seized his wife, forcibly held her down and lectured her at length, and ultimately physically assaulted her. The Court agreed that an additional charge of Unlawful Imprisonment, under KRS 509, was also appropriate. In Duncan v. Com., 322 S.W.3d 81 (Ky. 2010), the victim was taken from one location to another location for the purposes of a sexual assault. Finally, in Cox v. Com., 2011 WL 287321 (Ky. 2011), the victim was taken to another part of the house and sexually assaulted, and further held for a period of time before she finally escaped. In all three cases, the defendant raised the Kidnapping Exemption, codified in KRS 509.050. That statute prevents charging for a Kidnapping or Unlawful Imprisonment when the restraint was part and parcel of another crime outside KRS 509. In all three, however, the Court held the exemption not to apply because the restraint in each case did not occur “close in distance and brief in time,” and held that placing a separate charge under KRS 509 was appropriate. The Court noted that for the Kidnapping Exemption to apply, three requirements must be met: (1) the underlying criminal purpose was the commission of a crime defined outside KRS Chapter 509; (2) the interference with the victim’s liberty occurred immediately with or incidental to the commission of the underlying intended crime; and (3) the interference with the victim’s liberty did not exceed that which is ordinarily incident to the commission of the underlying crime. (Hatfield v. Com., 250 S.W.3d 590 (Ky. 2008). Only when all three requirements are not met can the defendant be separately charged with kidnapping or unlawful imprisonment. 🏠

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